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 16 JOHN J. COTA

17 UNITED STATES DISTRICT COURT
 18 NORTHERN DISTRICT OF CALIFORNIA
 19 SAN FRANCISCO DIVISION

20 UNITED STATES OF AMERICA,

21 Case No. CR 08-0160 SI

22 Plaintiff,

23 v.

24 **DEFENDANT JOHN J. COTA'S REPLY
 25 TO OPPOSITION TO MOTION TO
 26 SEVER**

27 JOHN J. COTA,

28 Defendant.

29
 30
 31 Defendant John J. Cota (“Captain Cota”), by and through his undersigned counsel,
 32 hereby files this reply to the United States’ Opposition (“Opposition”) to Motion to Sever
 33 (“Motion”).

34 **I. THE GOVERNMENT’S OPPOSITION IS BASELESS.**

35 Severance of improperly joined offenses is to be determined “solely by the allegations in
 36 the indictment” as a matter of law. *United States v. Terry*, 911 F.2d 272, 276 (9th Cir. 1990).
 37 Despite the government’s attempt in its Opposition to “infer” a relationship between the alleged
 38

1 false statements and the alleged negligent discharge claim, there is none – or at least to date,
2 there has been no evidence disclosed to the defense establishing any such connection. The
3 government should not be permitted to bootstrap an argument based on unsupported inference
4 and innuendo given the seriousness of the allegations at issue in this case. It strains credulity for
5 the government to argue – as it does in its Opposition – that Captain Cota’s negligence on
6 November 7, 2007 included his allegedly being “unfit for duty.” In its Indictment the
7 government specified six acts or omissions comprising its negligence claim – being unfit for duty
8 for medical reasons was not one of them. If the government has evidence of a connection
9 between the alleged false statements in January 2006 and January 2007 and the incident on
10 November 7, 2007, then it should have alleged such a connection and produced the supporting
11 evidence. The government did neither. Accordingly, the government should not be permitted to
12 draw connections and inferences based on unrelated conduct, suppositions and innuendo.

13 **II. CONCLUSION.**

14 For the foregoing reasons, Captain Cota respectfully requests that the Court sever the
15 felony false statement counts from the Clean Water Act and Migratory Bird Treaty Act counts.

17 Respectfully submitted,

19 K& L GATES LLP

21 Dated: July 11, 2008

22 By: /s/ Jeffrey L. Bornstein
Jeffrey L. Bornstein, Esq.
Luke G. Anderson, Esq.
Barry M. Hartman, Esq., *Admitted Pro Hac Vice*
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JOHN J. COTA

1 **PROOF OF SERVICE**

2 I am employed in the County of San Francisco, State of California by a member of the
 3 Bar of this Court, at whose direction this service was made. I am over the age of 18 and not a
 4 party to the within action. My business address is 55 Second Street, Suite 1700, San Francisco,
 CA 94105. On July 11, 2008, I served the document(s) described as:

5 **REPLY IN SUPPORT OF MOTION TO SEVER**

6 on the parties to this action named on the attached service list by the method described below.

7 (BY PERSONAL SERVICE) I caused a true and correct copy of said document(s) to be
 8 served by hand to the addressee(s) listed above, with the name and address of the person
 served shown on the envelope.

9 (BY OVERNIGHT DELIVERY) I enclosed a true and correct copy of said document(s) in an
 10 envelope/package provided by an overnight delivery carrier addressed to the addressee(s)
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 12 ordinary business practices of Kirkpatrick & Lockhart Preston Gates Ellis LLP. I am readily
 13 familiar with the firm's practice of collecting and processing correspondence for overnight
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 15 delivery, it is collected by an overnight delivery carrier. Delivery fees are pre-paid or
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16 (BY ELECTRONIC TRANSMISSION) I transmitted a true and correct copy of said
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 18 reasonable time after the transmission, any message or other indication that the transmission
 19 was unsuccessful.

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 21 the offices of the addressee(s). Upon completion of the facsimile transmission, a transmission
 22 report was issued showing the transmission was complete and without error.

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 26 readily familiar with the firm's practice of collecting and processing correspondence for
 27 mailing. On the same day that correspondence is placed for collection and mailing, it is
 28 deposited in the ordinary course of business with the U.S. Postal Service with postage fully
 prepaid at San Francisco, California.

22 Executed on July 11, 2008 at San Francisco, California.

23 I declare under penalty of perjury that the foregoing is true and correct.

24 /s/ Mae A. Chu

25 Mae A. Chu

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